tional area" did not have the approval of the Ketua Menteri.

There the matter rested for quite a while. What apparently prompted the applicants to file the writ were the several notices of demand for arrears of quit rent by the Assistant Collector of Land Revenue and threats to auction the land. The last of these demands was made on November 25, 1978.

The respondent had filed a summons in the court below under Order 25 rule 4 to have the action dismissed *inter alia* on the ground that it is time-barred. In reply, the applicants/plaintiffs by affidavit contended that the Limitation Ordinance does not apply because they became aware that they could sue the present State Government only in 1977, and also because the agent of the respondent Government had as late as November 25, 1978 demanded payment of quit rent. The learned judge held that these are not facts which would make the Limitation Ordinance inapplicable to the action.

Accordingly he held that the action was statute-barred and dismissed applicants/plaintiffs' claim with costs, a decision later affirmed by this court.

Commencing with the decision of this court in *Ratnam* v. *Cumarasamy & Anor.*[1] the test applied by Lord Alverstone C.J. in *Bozson* v. *Altrincham Urban District Council,*[2] now known as the Bozson test has been preferred by our courts to that applied in *Salaman* v. *Warner*[3] (the Salaman test). Put briefly the Bozson test is: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then it ought to be treated as a final order, but if it does not, then it is an interlocutory order.

We can envisage nothing which disposes of the rights of the parties with more finality than a finding that an action is time-barred.

In passing we note that Mr. Stephen Foo for the respondent expressed concern about the continuing controversy between proponents of Bozson and Salaman in England, a state of affairs specifically referred to by their Lordships of the Privy Council in *Tampion* v. *Anderson.*[4] In the later decision their Lordships adopted the suggestion of Lord Denning M.R. in *Salter Rex Co.* v. *Ghosh*[5] where he said,

"This question of final or interlocutory is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decisions."

Mr. Foo thinks that we should look up the precedents to be found in the practice books rather than apply either test.

The same argument was urged before this court in *Central Securities (Holdings) Bhd.* v. *Haron bin Mohamed Zaid*[6] without success.

Since we hold that the judgment of the High Court in the instant case is a final one we have no option but to allow the application for conditional leave on the usual terms.

Costs of and incidental to the application to be costs in the cause.

Application allowed.

Solicitors: *Sethu, Ghazali & Gomez.*

A. RAGUNATHAN v. PENDAKWA RAYA

[F.C. (Raja Azlan Shah Ag. L.P., Salleh Abas & Abdul Hamid F.JJ.) November 2, 1981]

[Kuala Lumpur — Criminal Appeal No. 5 of 1981]

Criminal Law and Procedure — Charge under Public Service Tribunal Act, 1977 — Applicant acquitted in Magistrate's Court — Appeal allowed in High Court — Application to refer questions of law to Federal Court — Ingredients necessary to prove prima facie case — Courts of Judicature Act, 1964, s. 66 — Public Service Tribunal Act, 1977, s. 18(1) — Criminal Procedure Code (F.M.S. Cap. 6), s. 173(b).

Constitutional Law — Public Service — Whether person is public officer — Public Service Tribunal Act, 1977, ss. 2 & 18(1) — Federal Constitution, art. 132.

The applicant had been charged with an offence under section 18(1) of the Public Service Tribunal Act, for making a communication to the press in regard to proceedings of the Tribunal. He was acquitted in the Magistrate's Court but on appeal by the Public Prosecutor, the appellate judge ordered the defence to be called on an amended charge. The applicant thereupon applied to the High Court to refer two questions of law to the Federal Court but his application was refused and he applied to the Federal Court. The questions proposed to be referred were —

(1) What ingredients must the respondent prove to establish a *prima facie* case in a prosecution against a defendant on a charge under section 18(1) of the Public Service Tribunal Act, 1977 read with paragraph 7 of the Schedule to the said Act?

(2) In a prosecution under section 18(1) of the Public Service Tribunal Act, 1977 is it sufficient for the respondent to establish that a defendant is a public officer within the meaning of the said Act by leading evidence to show that he (the defendant) is a member of a trade union consisting of Government servants?

Held: (1) it is not sufficient that the question raised is a question of law. It must be a question of law of public interest;

(2) the proper test for determining whether a question of law raised in the appeal is of public interest would be whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternative views;

(3) the court must consistently decline to receive and answer questions which though they might be questions of law are nevertheless not questions of law of public interest, in the sense that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject;

(4) in this case the application would be dismissed so that the case can continue in the Magistrate's Court.

Cases referred to:-

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49, 51-52; [1981] 3 W.L.R. 395, 402-403.

(2) *Public Prosecutor* v. *D'Fonseka* [1958] M.L.J. 102.

(3) *Yap Ee Kong* v. *Public Prosecutor* [1981] 1 M.L.J. 144.

(4) *Buckle* v. *Holmes* [1926] 2 K.B. 125.

(5) *Imperial Tobacco Ltd. & Anor.* v. *A.G.* [1980] 2 W.L.R. 466; [1980] 1 All E.R. 866.

(6) *Cecil Rajah* v. *Public Prosecutor* [1981] 1 M.L.J. 147.

FEDERAL COURT.

G. Sri Ram for the applicant.

Mohamed Noor bin Haji Ahmad (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah Ag. L.P. (delivering the judgment of the Court): By the Public Service Tribunal

Act (Act 186), Parliament set up the Public Service Tribunal to enquire into and resolve conditions of service. The work of this tribunal is limited by statute to the public service. For obvious reasons, Parliament sought to prevent dissatisfaction in the public service over the deliberations of the tribunal. Therefore by section 18(1) of the Act, any of the proscribed industrial actions as defined in section 2 and spelled out in the schedule is unlawful, after an anomaly has been referred to the tribunal, both during the pendency of and after the proceedings. Any communication, whether orally or in writing to the public or press is a proscribed industrial action. Such a communication may not be made by any member of a trade union or any member of an association of public officers which is an aggrieved person or any aggrieved person.

The Malayan Technical Services Union (MTSU) referred an alleged anomaly to the tribunal. Following the rejection of the reference, the General Secretary of the MTSU was alleged to have made a communication to the press in regard to the proceedings of the reference. The General Secretary, if not the aggrieved person himself was, by description, a member of the aggrieved trade union. He was accordingly charged in the Magistrates' Court at Kuala Lumpur with an offence under section 18(1), punishable under section 21, but he was acquitted and discharged without his defence being called. The Public Prosecutor successfully appealed and the appellate judge ordered the defence to be called on an amended charge. The applicant in the meanwhile filed a Notice of Motion (Kuala Lumpur High Court Miscellaneous Criminal Application No. 14 of 1981) to refer two questions of law to the High Court under section 66 of the Courts of Judicature Act, 1964. The application was refused. The applicant has now come to this court and he said that this case is the first of its kind and that it is in the public interest to reserve the following questions for our consideration:

(1) What ingredients must the respondent prove to establish a *prima facie* case in a prosecution against a defendant on a charge under section 18(1) of the Public Service Tribunal Act, 1977 read with paragraph 7 of the Schedule to the said Act?

(2) In a prosecution under section 18(1) of the Public Service Tribunal Act, 1977 is it sufficient for the respondent to establish that a defendant is a public officer within the meaning of the said Act by leading evidence to show that he (the defendant) is a member of a trade union consisting of Government servants?

He urged that if this court, while considering the said questions, find that on applying the evidence adduced thus far to the ingredients required to be proved by the prosecution, hold that no offence is disclosed, the matter need proceed no further. In such an event he said he will be spared substantial expense and time.

Section 66 of the Courts of Judicature Act requires that before we decide to answer any question referred under it we have to be satisfied that it is a question of law of public interest which has arisen in the course of the appeal, the determination of which by the judge has affected the event of the appeal. The section cannot be invoked by raising a ground which in his grounds of appeal and in the course of his submission, counsel for the applicant described as a mere question of law. Besides being that, it must be of public interest which arose in the course of the appeal and which determined the appeal.

One of the essential elements in the charge under section 18(1) of the Act is that the applicant is a "public officer" as contemplated by section 2 of the Act — "any person holding office or employment in or under any public service". That is the only point raised in the courts below and before us. "Public service" as enacted in section 2(a) means "any of the public services referred to in Article 132 of the Constitution, other than the Police Force or Armed Forces". Article 132(1) of the Constitution defines public services, *inter alia,* (c) the general public service of the Federation; and (g) the public service of each State.

The learned Magistrate found that the prosecution had failed to prove at the close of their case that the applicant is a public officer within the meaning of section 2, although he was satisfied that he is a trade union member. He held that the evidence of Mr. Korah George (PW3), the Executive Secretary of MTSU to the effect that the applicant is the General Secretary and that members of MTSU are Technical Assistants and Agricultural Assistants and that they are Government servants, is insufficient to prove that the applicant is a public officer. He was of the opinion that the prosecution should have called the applicant's Head of Department or a member of the Public Service Commission to testify that he is a public officer.

The learned judge took a different view. He held that there was *prima facie* evidence before the learned Magistrate that the applicant is a public officer. The applicant is a member of the MTSU, and the only inference that could be drawn is that he is a government servant holding the post of either Technical Assistant or Agricultural Assistant, as such he must be a public officer.

It is implied in the judgment of the learned judge that in his view, the Public Service Tribunal Act is concerned only with the public service, the Tribunal does not entertain references from the private sector and that in making the reference of an alleged anomaly to it, the union represents itself and the Tribunal accepts it to be a union of technical employees in the public service as defined in section 2 of the Act. And if, as appeared so clearly in the record, the reference was made by the applicant as the General Secretary and therefore, by definition, the executive officer of the Union, he was a public officer.

Nevertheless, we have, *ex abundanti cautela,* called for and looked at the Constitution of the MTSU. Rule 2.1 states as one of the objects of the Union — To secure the complete organisation of all monthly paid persons in the technical profession employed by the Federal and State Governments in Peninsular Malaysia. Rule 3.1 defines the membership of the Union. It consists of (a) Ordinary membership shall

be open to all monthly-paid technical workers over the age of sixteen years who are employed by Federal and State Governments in Peninsular Malaysia and (b) Honorary membership may be conferred by the Executive Council on any person as it deems fit. Rule 10.2 is a prohibitive provision and, *inter alia,* provides that no person shall be elected or act as an officer of the Union if (d) he is not engaged or employed as specified in Rule 3.1 for a period of at least three years. Rule 11.2 provides for the composition of the Executive Council which consists of, *inter alia,* the General Secretary, who shall be elected biennially by secret ballot by the whole membership.

In essence the questions referred to us are a submission that there is no case for the applicant to answer at the close of the prosecution case. It is said that the prosecution had failed to adduce any evidence that the applicant was a public officer and therefore has failed to establish a *prima facie* case against him which brings into effect section 173(f) of the Criminal Procedure Code. That section enacts:

"If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal."

The section is similar to section 188 of the Singapore Criminal Procedure Code (Amendment) Act, 1976 which the Privy Council has recently given judicial interpretation in *Haw Tua Tau* v. *Public Prosecutor.*[1] We quote certain passages from the speech of Lord Diplock *in extenso* for the benefit of all concerned (pages 51-52):

"For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.

The crucial words in section 188(1) are the words 'if unrebutted', which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words 'if unrebutted' refer. What they mean is that for the purpose of reaching the decision called for by section 188(1) the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided; questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, *if it were to be accepted by the jury as accurate,* would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict; but, if there is some evidence, the judge must let the case go on. It is not the function of jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had any opportunity of putting before them any evidence in his defence. On the question of the accuracy of the evidence of any witness, jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding 'that no case against the accused has been made out which if unrebutted would warrant his conviction', within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance."

Applying that principle, the learned Magistrate at the close of the prosecution's case had to determine as a question of law whether on the evidence as adduced, and unrebutted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. That is the question raised in the appeal. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact, that the applicant is guilty as charged.

But it is not sufficient that the question raised is a question of law. It must be a question of law of public interest. What is public interest must surely depend upon the facts and circumstances of each case. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case

the question would not be a question of law of public interest.

It was urged upon us that in at least two previous cases (see *Public Prosecutor* v. *D'Fonseka;*[2] *Yap Ee Kong* v. *Public Prosecutor*[3]) the applicants had successfully obtained a reference, and that we should follow those cases and determine the questions referred to us. It was further said that the questions are of general importance upon which further argument and a decision of this court would be to the public advantage (see *Buckle* v. *Holmes*[4]). A short answer is that the two cases referred above involved misdirections in law and this court had no hesitation to intervene because they called for discussion of alternative views. There are no two views about the present case.

Insofar as the plea of great convenience is concerned, the House of Lords in England in *Imperial Tobacco Ltd. & Anor.* v. *A.G.*[5] has rejected the same plea in no uncertain terms. It held that where criminal proceedings have been properly instituted and are not vexatious or an abuse of the process of the court it is not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged did not in law prove the offence charged. For ourselves, we are of the view that for the purposes of section 66 of the Courts of Judicature Act it is not a proper exercise of our discretion to answer questions where the answers are already provided by well-settled general principles, which have to be applied to the facts of the case.

But basically, we must consistently decline to receive and answer questions which though they may be questions of law are nevertheless not questions of law of public interest, in the sense as we understand it, that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject: see section 66(6)(a) Courts of Judicature Act, 1964.

We would therefore follow the example of this court in *Cecil Rajah* v. *Public Prosecutor*[6] for the reasons in this judgment.

The application is dismissed.

Application dismissed.

Solicitors: *Sri Ram & Co.*

LOOT TING YEE v. TAN SRI SHEIKH HUSSAIN BIN SHEIKH MOHAMED & ORS.

[F.C. (Raja Azlan Shah Ag. L.P., Mohamed Azmi & Hashim Yeop A. Sani JJ.) November 5, 1981]

[Kuala Lumpur — Civil Appeal No. 12 of 1981]

Practice and Procedure — Contempt of court — Action for declaration pending in High Court to declare transfer of appellant invalid — Notice issued by respondents asking appellant to show cause why he should not be dismissed for non-compliance with transfer order — No risk of prejudice to fair and proper trial — R.H.C. 1980 O. 52 r. 3.

The appellant a teacher in a school in Kuala Lumpur was ordered to go on transfer to Trengganu. He refused to comply with the transfer order and he appealed to the education authority to cancel the order. His appeal was unsuccessful. He then brought an action for a declaration that the purported transfer was void and of no effect. While the suit was still pending the respondents, the Education Service Commission, sent a notice to him to show cause why he should not be dismissed from the teaching service for non-compliance with the transfer order. The appellant applied under Order 52 r. 3 of the Rules of the High Court 1980 to commit the respondents for alleged contempt of court. The application was dismissed in the High Court and the appellant appealed to the Federal Court.

Held: (1) the real question for the court in this case to decide whether there was contempt, was whether the risk of prejudice to a fair and proper trial of the pending legal proceedings was serious or real or substantial;

(2) it could not be said that the fair and proper trial of the issues in the pending action would be in any way hampered or adversely affected by the show cause notice and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Attorney-General* v. *Times Newspapers Ltd.* [1973] 3 All E.R. 54.

(2) *King* v. *Parmanand* A.I.R. 1949 Pat. 222, F.B.

(3) *K.T. Chandy* v. *M.R. Zade* A.I.R. 1974 S.C. 642.

(4) *Haji Ismail bin Che Chik* v. *State Commissioner, Penang* [1975] 1 M.L.J. 271.

(5) *Vine Products Ltd. & Ors.* v. *Green & Anor.* [1966] 1 Ch. 484.

(6) *Jang Bahadur Singh* v. *Baij Nath Tiwari* A.I.R. 1969 S.C. 30.

(7) *M/s. Security and Finance* v. *Dattatraya* A.I.R. 1970 S.C. 720.

(8) *Pratap Singh* v. *Gurbaksh Singh* A.I.R. 1962 S.C. 1172.

(9) *Rizwan-Ul-Hasan* v. *State of Uttar Pradesh* A.I.R. 1953 S.C. 185, 187.

(10) *R.* v. *Ingrams & Ors., Ex parte Goldsmith* [1977] Crim. L.R. 40.

HIGH COURT.

Karpal Singh (*S.T. Lee* with him) for the applicant.

Tan Sri Datuk Abu Talib bin Othman, Attorney-General (*Lim Beng Choon,* Senior Federal Counsel with him) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J.: The applicant had earlier obtained leave under Order 52(3) of the Rules of the High Court, 1980, and had then made the application to commit for contempt the seven respondents, the Chairman, the Deputy Chairman and members of the Education Service Commission.

The events leading to the application is set out in the affidavit and statement, both dated September 29, 1980 accompanying the notice of motion.